Commonwealth of Massachusetts
Supreme Judicial Court

ESSEX COUNTY

NO. SJC-11010

AMY E. HUNTER,

PLAINTIFF-APPELLEE

v.

MIKO ROSE,

DEFENDANT-APPELLANT

ON APPEAL FROM A JUDGMENT OF THE
ESSEX PROBATE AND FAMILY COURT

REPLY BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (cont'd)

Statutes and Rules

ARGUMENT

I. PLAINTIFF CANNOT JUSTIFY THE COURT'S RULING GIVEN THE ABSENCE OF ANY EVIDENCE SHOWING THAT J HAD SUFFERED HARM FROM THE MOVE, GIVEN UNDISPUTED EVIDENCE SHOWING THAT SHE IS THRIVING, AND GIVEN THE COURT'S UTTER FAILURE TO ASSESS THE IMPACT OF CUSTODY TRANSFER ON J .

In her brief, plaintiff-appellee Ann Hunter only addresses the custody order and J 's "best interests" after attempting to establish a "legal spousal relationship" and her own rights as a "legal parent". Consistent with defendant-appellant Miko Rose's opening brief, however, this reply shall take up the custody order and its impact on J first.

Plaintiff parrots the trial court's repeated references to "instability", defendant's moves with J , and changes in J 's day care in order to show "harm" which would justify the draconian change of custody [Appellee's Brief at 16, 39]. The trial court's findings and plaintiff's brief both are notable, however, for what they don't mention. Both ignore a startling lack of supporting facts and an abundance of unrefuted evidence to the contrary. As defendant has pointed out, the record conclusively establishes two things. First, even though plaintiff's own expert testified to the multiple manifestations

which should appear in J if she is suffering harm, including eating and sleeping disturbances, sadness, listlessness, withdrawal, inability to interact, and "often" being "aggressive", those are simply missing here [A. 1755, 1790-91, 1107, 1557, 571-75, 2134-43; Appellant's Brief at 26-28].[1] In actuality J was a healthy, thriving child while living with her mother. Hence plaintiff's concession that her primary concern about J was how often she saw the child [A. 1292]. In lieu of specific facts the trial court resorted to assumption, speculation and prognostication. Those are poor substitutes for concrete evidence when it comes to determining a young child's welfare [A. 863, 870]. Plaintiff's (and the trial court's) assertion of harm is based solely on instances of "aggressive" behavior [Appellee's Brief at 13, 15 n.9, 42; A. 860-64]. But those instances were isolated and almost all occurred in connection with transitions between the parties [A. 3375, 1645,

[1] Plaintiff says this testimony related only to "complete removal" of contact but then concedes that it applied to J 's move to Oregon [Appellee's Brief at 41 n.39].

1658, 2195-97].[2] If proof that a young child has had instances of disruptive behavior with other children at day care or school or during a transition between separated adults is enough *sans* more to dictate a change in custody, the trial courts will become revolving doors for the drastic solution of custody transfer. That is not Massachusetts law.

Second, the trial court utterly ignored the impact on J of the change in custody from her mother with whom she had lived her entire life and with whom she indisputably has a "close bond" [A. 869]. This was despite plaintiff's admission that the change would be detrimental for J and despite the first judge's refusal to order J 's return because he rightly understood the harmful consequences [A. 1576, 1295; 142].[3]

Plaintiff appears to dispute in a footnote that the court should have utilized the report filed by the "GAL/next friend" in June, 2010 [Appellee's Brief at

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[2] The irony is that the court apparently credited the testimony of defendant's witnesses when that suited its purpose but rejected the credibility of the same witnesses when their testimony showed that J was faring well.

[3] Consistent with her testimony, plaintiff's brief acknowledges that this custody order was not one that she sought [Appellee's Brief at 38 n.31].

44 n.44]. That report was replete with facts which bore on J 's condition in September, 2009 and which evidenced a "healthy", "well-behaved" child despite the move to Oregon ten months earlier [A. 572-73]. The report was filed by a person specifically appointed by the court to represent J and M . It was based on personal knowledge [A. 571-75]. The report could hardly be dismissed on the putative credibility rationale which was used by the court to reject otherwise-unrefuted evidence from defendant and her witnesses. Not surprisingly, plaintiff never objected to the report's filing and never challenged its content. That report filled a critical gap in the record concerning J , especially given the trial court's unwillingness to consider other evidence regarding how J was doing in Oregon [A. 2134-43]. Defendant does not argue that the court was required to follow a *recommendation* or a *conclusion* of the "GAL/next friend" regarding custody. *See Mason v. Coleman*, 447 Mass. 177, 186 & n.12 (2006). Instead, the report shows objective, undisputed *facts* recounted by an individual with first-hand knowledge. This court ought to summarily reject any assertion that the report should not be considered in determining the

best interests of a young child on the record presented here.

Plaintiff also suggests that the trial court's extraordinary order requiring a sudden change in J 's custody was somehow necessitated by defendant's anticipated move to Michigan [Appellee's Brief at 42-43]. This makes little sense. J was in Oregon in her mother's custody, not in Massachusetts. Had she moved to Michigan with her mother, she would have been some two thousand miles *closer* to Massachusetts. Why the intended move warranted a four-day transfer order defies logic. Moreover, the court knew about defendant's planned move as of January 31, 2011 [A. 2658]. There was nothing urgent about the circumstances which remotely justified an order that J abruptly be transported three thousand miles within four days and her custody altered, other than unfounded speculation or an apparent punitive purpose.

II. PLAINTIFF CITES NOTHING WHICH SUPPORTS HER ARGUMENT THAT THIS COURT SHOULD ENFORCE THE RDP SCHEME IN MASSACHUSETTS DESPITE ITS UNCONSTITUTIONALITY OR THAT THIS COURT SHOULD DO SO DESPITE HER VOLUNTARY ELECTION TO FOREGO MARRIAGE OR ADOPTION IN MASSACHUSETTS.

In order to establish a "legal spousal relationship" which makes her a "legal parent" of J , plaintiff relies on the California Registered Domestic Partner ("RDP") scheme. She does not, however, and cannot, dispute that the RDP scheme violates the Massachusetts Constitution, because a virtually identical scheme has been condemned by this court on constitutional grounds. *Opinions of the Justices,* 440 Mass. 1201, 1206-09 (2004) [Appellee's Brief at 22-26; Appellant's Brief at 29-32]. As defendant has argued, a primary consideration in this court's constitutional analysis was the discriminatory and stigmatic impact on the children of parties to unions which are established by such alternative schemes. *Opinions of the Justices, supra* at 1206-08; *Goodridge v. Dep't of Public Health,* 440 Mass. 309, 312, 325 (2003). Plaintiff cites *Cote-Whiteacre v. Dep't of Public Health,* 440 Mass. 350 (2006) but nothing there suggests that this constitutional problem should be overlooked as a matter of comity.

One of the concurring opinions stated that non-residents could be denied a Massachusetts marriage license if their home states barred same-sex marriage, but articulated an important limitation on deference to another state's laws - "provided that a *State's own citizens are not unfairly prejudiced thereby*, and a State's public policies are not impaired" and that "'due regard'" be given "'to the *rights of its own citizens*'". *Id.* at 368 (Spina, J., concurring) [emphasis added]. The dissent stated the fundamental proposition succinctly. "[I]t should be clear that *Goodridge* forecloses application of other states' discriminatory marriage laws in the Commonwealth, because such discrimination is against our public policy." *Id.* at 401 (Ireland, J., dissenting).

Plaintiff simply ignores this problem when she asserts that the California structure should be enforced in Massachusetts. Instead, she cites a line of hoary decisions from the nineteenth and early twentieth centuries [Appellee's Brief at 24-25, 27-28, 33 and cases cited]. Those cases plainly fail the assigned task.

First, in *none* did the court enforce a foreign scheme which violated individual rights under the

Massachusetts Constitution. Instead, in each the court merely was confronted by a foreign marriage which could not have been entered into in Massachusetts at the time. *See Boltz v. Boltz*, 325 Mass. 726, 728-29 (1950); *Comm. v. Lane*, 113 Mass. 458, 463 (1873); *Sutton v. Warren*, 51 Mass. (10 Metcalf) 451, 453 (1845); *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157, 160-61 (1819). Enforcement of those foreign marriages therefore infringed no constitutional rights in the Commonwealth.

Nor, of course, did any of those cases present the question which arises in the constitutional context here - whether a foreign state's arrangement which is *not* a "marriage" nonetheless is entitled to validation in Massachusetts. Instead, all involved a foreign state's recognition of traditional marriage, subject only to differing criteria as to when that relationship would be formally recognized.

Moreover, those cases acknowledged that by simple legislative enactment Massachusetts could bar enforcement of the foreign marriage - it simply had not done so at the time or in the context presented. *Boltz, supra* at 729; *Comm. v. Lane, supra* at 463; *Inhabitants of Medway, supra* at 160; *Comm. v. Graham,*

157 Mass. 73, 75 (1892); *Milliken v. Pratt,* 125 Mass. 374, 383 (1878). *See also* G.L. c. 207, § 10. The California RDP scheme, as noted, affirmatively violates the Massachusetts Constitution. Plaintiff's argument requires that this court rule as follows: (1) by mere legislative action Massachusetts may without limitation decide that any foreign marriage is unenforceable *even if* that marriage infringes no one's rights but (2) no similar barrier applies by operation of the Massachusetts Constitution where individual rights *would be* infringed by the foreign arrangement. This defies common sense in a jurisdiction where statutes are subordinate to the Constitution. "It is the very cornerstone of our system of government that none of the three great departments, the legislative, the executive, or the judicial, can destroy or impair the constitutional rights of any person." *Opinion of the Justices,* 332 Mass. 763, 765 (1955). What the Legislature could not do in *Opinions of the Justices, supra* at 1206-09, this court cannot do here.[4]

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[4] Plaintiff cites cases from two other jurisdictions which recognized foreign same-sex relationships despite forum law [Appellee's Brief at 25 n.13]. In none, however, did the foreign scheme violate the rights of forum residents. *Christiansen v. Christiansen,* 253 P.3d 153, 155-57 (cont'd)

Ironically, one of the stated purposes for the policy which was applied in these venerable decisions can only be fulfilled here by denying enforcement. Decided at a time when birth out of wedlock had more dire social and reputational consequences for a child than is the case today, the court routinely articulated that as a core reason for validating the foreign marriage. *See Inhabitants of Medway, supra* at 160-61, stating an intention "to prevent the *disastrous consequences to the issue* of such marriages" [emphasis added]; *Milliken, supra* at 381, stating that recognition of a marriage's validity "permanently affects the relations and the *rights* of two citizens and *of others to be born*" [emphasis added]; *Putnam v. Putnam,* 25 Mass. 433, 434 (1829), noting the "effect upon" "innocent offspring"; *cf. Richardson v. Richardson,* 246 Mass. 353, 354 (1923). Here, however, plaintiff asks this court to enforce an arrangement which imposes a discriminatory stigma on J

(Wy. 2011); *Dickerson v. Thompson,* 73 A.D.3d 52, 897 N.Y.S.2d 298, 299-301 (3rd Dep't 2010); *see also Debra H. v. Janice R.,* 930 N.E.2d 184 (N.Y. 2010) [Brief at 31 n.23]. Moreover, two are clear that their rulings were limited narrowly to granting divorce. *Dickerson, supra* at 301-02; *Christiansen, supra* at 156-57 (parties were "not seeking to enforce any right incident to the status of being married").

. That ruling would disserve the motivating force behind the very decisions which she cites.

This court need not decide the hypothetical question which would be presented had the California RDP scheme been the only available option for plaintiff. As defendant has argued, plaintiff had ample opportunity to take advantage of two options, both of which fully comport with the Massachusetts Constitution. She could, of course, have pursued marriage under this court's ruling in *Goodridge, supra* at 342-43. She opted not to do so based on alleged financial grounds which fail even brief scrutiny [A. 1331-36, 1342-49]. She implies that her choice was driven in part by the discriminatory health insurance coverage rules applicable to her federal employer [Appellee's Brief at 36]. That point is a classic "red herring". Plaintiff obtained private health insurance [A. 1331]. She chose not to add defendant and J as insureds for putative cost reasons, despite her six-figure salary and despite her choice to use the savings for other, discretionary treatments for herself and her pet [A. 1342-49]. Defendant and J , meanwhile, were insured cost-free under Mass Health

[A. 1340]. Plaintiff's implication that her decision was forced by discrimination is patently untrue.[5]

Plaintiff also could have adopted J under *Adoption of Tammy*, 416 Mass. 205 (1993). Once she finally got around to commencing this process in January, 2008 it was interrupted in April because the attorney who had been lined up received a judicial appointment [A. 1505-10]. Plaintiff did nothing further, however, until August, 2008, *after* the parties' relationship had foundered and she decided on adoption as a strategy to implement her status as a legal parent [A. 1505-10]. In material respects the record at bar is no different from that in *A.H. v. M.P.*, 447 Mass. 828, 829-30 (2006), where this court rebuffed the calculated effort by a party to obtain parental rights through an alternative scheme after having eschewed a method authorized by Massachusetts law.

In effect, plaintiff asserts that because she voluntarily decided not to establish her parental rights regarding J through lawful means, this court should now do it for her through a method which

[5] In July, 2007 plaintiff also told defendant that "problems" in their relationship made marriage undesirable [A. 2057-58].

is unconstitutional. Stating the proposition illustrates its fatal flaw. These cases are not beta sites in which experimental theories of "legal parent" can be tested and adopted in the name of a child's "best interests". Multiple means which are lawful under Massachusetts law were fully available but were knowingly and willfully disregarded. If plaintiff truly believed that J 's best interests were served be having two parents, she should have followed the advice she received [A. 1506-08, 1320-23].

On this point the amicus brief uses a superficial, result-oriented analysis, indulges in cursory treatment of *Opinions of the Justices*, and makes its case by resort to the label "absurd" [Amicus Brief at 22]. Amici are "California family law professors" who assert "expertise … in evaluating the application of California law" [Amicus Brief at 1]. They claim no expertise in Massachusetts law and their characterization of *Opinions of the Justices* should carry no weight. In fact, their description of the RDP scheme - which, in effect, is that "it's just like marriage in all but name" - shows conclusively why it runs afoul of this court's analysis [Amicus Brief at 21]. *Opinions of the Justices, supra* at 1207-08. What

warranted advice in *Opinions of the Justices* mandates a ruling here.

Plaintiff suggests that defendant "had no objection to the trial court's recognizing RDP in order to dissolve it" [Appellee's Brief at 24 n.11]. But defendant consistently challenged the enforceability of the RDP scheme in Massachusetts from the beginning of the case through its very end - hence the preliminary rulings which plaintiff tries to use on that very question [A. 133-45, 452-54]. In her proposed rationale defendant clearly and yet again challenged the RDP scheme [A. 2654, 757].[6]

Plaintiff's brief carries a possible implication that this court should recognize some sort of vaguely-defined "parental" status under California law even if the RDP is not enforced [Appellee's Brief at 29 n.18]. If plaintiff makes this argument it has been waived because plaintiff sought legal parent status based solely on the RDP [A. 703, 1749-50]. *Milton v. City of Boston*, 427 Mass. 1016, 1017 (1998) and cases cited. Moreover, it has no merit. This court has made clear

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[6] Defendant, of course, had no objection to the trial court's use of any rationale in order to prevent enforcement of plaintiff's claim to legal parent status as to J under the RDP, regardless of what form it might take.

that in Massachusetts the "best interests" of a child "is not a catch-all vessel into which any assertion of rights to the care and custody of a child is entitled to flow." *A.H., supra* at 837 n.12. If plaintiff seeks full parental rights as to J simply because two adults agreed to an artificial insemination procedure in California, she fails. Massachusetts expressly conditions parentage in these circumstances on the existence of a "marri[age]". G.L. c. 46, § 4B. As the amici point out, California also requires a recognized legal spousal relationship [Amicus Brief at 26-27]. The reason is obvious. If this prerequisite were not in play, an adult with no connection to the child other than merely having "agreed to" the insemination procedure would have parental rights. Little analysis is needed to demonstrate the fatal flaw in that postulate. Section 4B establishes a fundamental policy of Massachusetts. That policy would be directly contravened if this court were to give plaintiff parental rights notwithstanding that there is no enforceable legal spousal relationship. Whether the facts here might warrant visitation privileges, *cf. E.N.O. v. L.M.M.*, 429 Mass. 824, 832-33 (1999), is not the question. Unless plaintiff can show a valid

spousal relationship or that she took lawful steps in Massachusetts to establish her parental relationship to J , she cannot obtain that objective through an indirect method which is against public policy.

III. PLAINTIFF'S ARGUMENT THAT DEFENDANT "CONSENTED IN WRITING TO" M 'S CONCEPTION RELIES ON A DISTORTION OF THE UNDISPUTED EVIDENCE.

Avoiding the constitutional problem inherent in her effort to make defendant M 's "legal parent" by enforcing the unconstitutional RDP scheme, plaintiff argues that defendant "consented" "in writing" to M 's conception and birth [Appellee's Brief at 9, 32]. She cites nothing, however, which was signed by defendant and which relates to plaintiff's in vitro fertilization in Boston in April, 2008 because there *is* nothing [Appellee' Brief at 30-31, 32 & n.25]. Instead, plaintiff relies on an earlier consent signed with respect to her treatment at a Rhode Island facility which did *not* result in M 's conception [Appellee's Brief at 30-31 and record references]. Like the trial court, she wrongly twists this into consent to the process which *did* result in conception [A. 856] Plaintiff conceded at trial that defendant never signed any of the required forms for the Boston facility and that defendant's limited and

"wan[ing]" involvement with the conception process there did not amount to "legal consent" [A. 1298-99, 1559].[7] Plaintiff's statement that "... the Commonwealth listed both parties as ... parents" is equally misleading [Appellee's Brief at 13]. At trial plaintiff admitted that she unilaterally listed defendant as M 's parent without defendant's knowledge or consent [A. 1298, 1366-74, 3371-73]. In other words, the "Commonwealth" listed nothing - plaintiff did, for her own strategic purposes in the already-commenced litigation.

IV. PLAINTIFF FAILS TO SUBSTANTIATE THE RATIONALE FOR THE FEES AWARD AND CONCEDES THAT THIS LITIGATION INVOLVES A "DEVELOPING AREA" OF THE LAW.

Plaintiff defends the trial court's assessment of attorneys fees on the basis of the preliminary rulings made in the case regarding the California RDP scheme [Appellee's Brief at 46-47]. None of those rulings, however, was made after a meaningful or evidentiary hearing and, surprisingly, none evaluated the

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[7] Even more egregiously the court distorted defendant's testimony about not signing a consent form in California after plaintiff had interrupted her. Defendant responded to the court's hypothetical with "I don't know"; the court cut off her explanation; and it then twisted that into a finding that defendant "testified that she would have signed" [A. 2556-57, 826].

significant constitutional hurdle raised by *Opinions of the Justices, supra* at 1206-09 [A. 133-45, 452-54].[8] In fact, in her own brief plaintiff reveals the problem with her assertion. Arguing the merits of her case, plaintiff describes her efforts to "navigate an area of developing law" [Appellee's Brief at 35]. This concession, of course, undermines plaintiff's assumption that her parental status was established in Massachusetts at the time defendant moved to Oregon in October, 2008. But it also undermines the trial court's rationale as to attorneys fees, which apparently concluded that defendant was obligated to fold after a cursory, preliminary ruling in this unexplored realm and to simply waive the even more important, and wholly-unevaluated, questions regarding J 's "best interests". Her point should be rejected out of hand.

Plaintiff's assertion that defendant's attorney "tamper[ed]" with the trial court's docket is simply untrue [Appellee's Brief at 48]. If any "tampering" occurred, it was by plaintiff. During a hearing early in the litigation plaintiff's lawyer revealed that

[8] Even in the extensive rationale issued as part of the final judgment the trial court dodged this question [A. 897-98 & n.3].

plaintiff had caused the issuance of a vital record listing herself as "married" to defendant and defendant as M 's "parent". Defendant's attorney then reviewed the docket in the clerk's office and learned that plaintiff apparently had caused a California RDP certificate to be listed as a "certificate of marriage" [A. 251]. Counsel asked that the docket accurately reflect the document which was on file. After internal consultation with a supervisory employee, the clerk's office made the correct entry and the Register of Probate was advised [A. 251-52].[9]

Finally, plaintiff's argument that the award stems from defendant's alleged violation of orders is meritless [Appellee's Brief at 47]. Although plaintiff asserted contempt on multiple occasions there was no finding of contempt [A. 11-20]. Defendant complied with the orders regarding visitation. The award was not based on contempt or articulated as a discovery

[9] Plaintiff's statement that defendant sought recusal of the first judge based on "bias" is inaccurate [Appellee's Brief at 3 n.3]. Recusal was sought and obtained because the judge indisputably had two ex parte, substantive communications with the GAL initially appointed in the case and failed to disclose them, contrary to SJC Rule 3:09, Canon 3B(7), and also created the appearance of a lack of impartiality [A. 150-52].

sanction but, instead, as a consequence of defendant choosing to litigate the core issues of "legal parent" and her daughter's custody [A. 949-51].

CONCLUSION

The judgment of the trial court should be reversed.

RULE 16(k) CERTIFICATION

The undersigned certify that this brief complies with the Massachusetts Rules of Appellate Procedure.

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